BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PATTI L. SCHARTZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,037,927
VERIZON DATA SERVICES	)	
Respondent	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the February 20, 2009, Award entered by Administrative Law Judge John D. Clark. The Workers Compensation Board heard oral argument on June 24, 2009.

APPEARANCES

James A. Cline of Wichita, Kansas, appeared for claimant. John R. Emerson of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.[1]

ISSUES

This is a claim for a February 16, 2006, accident that occurred while claimant was leaving a parking garage on her way to the building where she worked. In the February 20, 2009, Award, Judge Clark found claimant was not injured on respondent's premises and

[1] By letter dated February 4, 2009, respondent's insurance carrier advised it had paid in medical benefits $9,249.14 rather than $6,903.22, which was earlier indicated in its submission letter.

that her accident did not involve any special hazard. The Judge summarized his findings, as follows:

> The Claimant, Ms. Schartz, was simply on her way to work after parking her car in a public garage and by going up and down the staircase she was not subject to any special hazard and she was not on any premises owned or controlled by the Respondent.[2]

The Judge found claimant's accident did not arise out of and in the course of her employment with respondent and, consequently, denied compensation.

Claimant notes the following as issues: nature and extent of disability, whether claimant's injuries arose out of and in the course and scope of her employment with respondent, and whether respondent should be required to pay for additional medical treatment received by claimant.

Claimant contends she is entitled to workers compensation benefits. She maintains she was required to park in a secured parking garage not available to the public and slipped and fell on metal stairs as she was exiting the parking garage using the only route available. She asserts her accident is compensable as she was either on respondent's premises or the accident occurred on the only available route to work, which held a special risk and was a route not used by the public. Accordingly, claimant argues there is a causal connection between the conditions in which her work was required to be performed and the resulting injury.

In addition, claimant argues she incurred medical expense when respondent refused to provide medical treatment that its own doctor determined was necessary and, therefore, she requests the Board to order respondent to pay for that medical treatment. Finally, claimant maintains she has a 49 percent work disability[3] based upon an averaged 56.75 percent task loss and a 42 percent wage loss.

Respondent contends the Award denying benefits should be affirmed. Respondent argues claimant fell in a parking garage owned, controlled and maintained by an entity other than respondent and, therefore, claimant did not fall on respondent's premises. In addition, respondent argues claimant's accident occurred in a place that was accessible by the public for purposes other than dealings with respondent. Finally, respondent argues this claim is not compensable under the Workers Compensation Act because, in essence,

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[2] ALJ Award (Feb. 20, 2009) at 4.

[3] A permanent partial general disability under K.S.A. 44-510e that is greater than the functional impairment rating.

claimant's accident occurred as the result of an activity of daily living as claimant was equally exposed to the hazard of stairs when she was away from work.

Should the Board find claimant's injury is compensable, respondent contends claimant's permanent disability benefits should be based upon her functional impairment rating only, as the weeks of the award according to respondent would have already run by the time claimant was eligible for a work disability.

The issues before the Board on this appeal are:

1. Did claimant fall on respondent's premises or on the only available route to work that held a special risk or hazard and which was not used by the public except in dealings with respondent?

2. If so, what is the nature and extent of claimant's injury and disability?

3. And is respondent responsible for paying additional medical expense?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant worked for respondent for over 13 years as a computer systems analyst. While on her way to work on February 16, 2006, claimant fell in the stairwell of the secured parking garage where she had parked. The accident occurred at approximately 4:15 a.m. As a result of that injury, claimant eventually underwent a low back fusion and as opined by Dr. Paul S. Stein claimant sustained a 22 percent whole person functional impairment as measured by the AMA *Guides*.[4]

The first issue to address is whether claimant's accident is compensable under the Workers Compensation Act. The Act provides compensation to injured workers when they sustain injuries that arise out of and in the course of their employment.[5] But the Act also provides that injuries occurring while a worker is on the way to work or after leaving work do not qualify for compensation. K.S.A. 2005 Supp. 44-508(f) reads in pertinent part:

[4] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[5] K.S.A. 2005 Supp. 44-501(a).

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. . . .

Claimant argues her accident is compensable for either of two reasons. First she maintains her accident occurred, in essence, on respondent's premises. Second, claimant contends her accident occurred on the only available route to or from work, which involved a special risk or hazard.

Respondent paid for claimant's parking. And the secured parking garage where claimant was injured was managed by the same company that rented respondent the office space where claimant worked. But after claimant's accident the parking garage was sold.

At all times germane to this claim a permit was required to access the garage. Consequently, the garage was not open to the general public. The parking garage was multi-level and claimant was permitted to park in any space other than those that had been reserved on the first two or three levels. Claimant worked with six or seven other people, who also parked in the garage. Claimant did not know who parked in the other several hundred spaces. There is no evidence in the record that respondent controlled or maintained the garage.

Claimant was required to be at work at 4:30 a.m. The elevators in the parking garage were not turned on until 5:00 a.m. Consequently, claimant (and any others in the parking garage before 5:00 a.m.) took the stairwell to exit the parking garage.

An alley separated the office building where claimant worked from the parking garage. Accordingly, once claimant exited the parking garage she had to walk for approximately one-half block either through the alley or on the city street to get to her office building, where respondent rented the entire eighth floor. Claimant was not certain how many floors there were in the building but she thought there were perhaps 12. In any event, the building was secure as a badge was required to enter the building, the elevators required a code, and respondent's offices required a key or password.

In *Rinke*,[6] an employee slipped in a parking lot outside her office building. The employer, a bank, used this facility for telephone banking operations and rented 94 percent of the building. There was no sign posted informing the public that the building housed a bank. And there was no walk-in traffic, except for the use of an ATM on the first floor. The remaining 6 percent of the building was occupied by Wesley Occupational Services (Wesley). The lease granted the bank the right to use the adjacent parking lot and, among other things, install an ATM facility along the lot's eastern edge.

The lease in *Rinke* also specifically granted the bank the right to use 737 of the lot's 757 spaces as "reserved spaces." The remaining 20 spaces, located in the eastern and southern corner of the lot away from the building, were reserved for Wesley employees and patients, who, like everyone else, had to enter and exit the building through one door. The Wesley spaces were marked with a sign stating "Wesley Occupational Health Parking." The general public could utilize the non-Wesley spaces, but the general public would have no reason to enter the building unless they went to Wesley's area.

The lease in *Rinke* also provided the owner was responsible for maintenance, lighting, and security of the lot. The bank, however, did possess the right to have the owner promptly tow away any unauthorized vehicles parked in the lot. The owner of the office building also owned the parking lot.

The Board in *Rinke* determined the employee's accident was compensable under the Workers Compensation Act as she fell on respondent's premises. The Kansas Supreme Court affirmed the Board and held that the facts indicated the bank held some measure of control inherent in its lease of 737 of 757 spaces in the lot adjacent to the building that was being rented from the same landlord in the same lease. The Supreme Court held there was little practical difference between those circumstances and those where an employer owns the building and its adjacent lot. In essence, the Supreme Court found the situation was equivalent to an employer-owned parking lot.

The Board finds *Rinke* is distinguishable on its facts as, in the case at hand, respondent rented only a small fraction of the parking garage, the parking garage was available to others and, in fact, utilized by others to a far greater degree than respondent, respondent neither controlled nor maintained the parking garage, and the garage did not abut the office building where respondent was located. The facts that made the parking lot the equivalent to an employer-owned lot in *Rinke* are missing in this claim. Consequently, the Board finds the parking garage where claimant fell should not be

[6] *Rinke v. Bank of America*, 282 Kan. 746, 148 P.3d 553 (2006) (as corrected, 2007).

considered as part of respondent's premises.[7] Accordingly, the Board concludes claimant had not reached respondent's premises when she fell in the stairwell of the parking garage.

Likewise, the Board does not find that claimant fell "on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer" as set forth in K.S.A. 2005 Supp. 44-508(f). First, the route was not the only available route to work, although it may have been the only way out of the parking garage at that hour other than walking down the garage ramp. Indeed, there is no evidence the office building where claimant worked was accessible only by way of the parking garage. It is safe to assume there were numerous routes to the office building as it is located on a public street. In addition, the Board finds the evidence fails to establish the stairwell held any special risk or hazard. Moreover, the evidence fails to establish that the stairwell where claimant fell was limited to only those who dealt with respondent. In short, the Board concludes the above-quoted exception to the "going and coming" rule is not applicable.

In conclusion, the Board finds that claimant did not fall on respondent's premises and that she was on her way to work when she fell on February 16, 2006. Consequently, claimant's accident did not arise out of and in the course of her employment with respondent. Therefore, her request for benefits should be denied. This finding renders moot the issues regarding the nature and extent of claimant's injury and disability as well as her request for the payment of additional medical expense.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[8] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the February 20, 2009, Award entered by Judge Clark.

IT IS SO ORDERED.

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[7] See *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994), in which the Kansas Supreme Court rejected the employee's argument that she was on her employer's premises as soon as she parked her car in a public parking garage across the street from the office building where she worked.

[8] K.S.A. 2008 Supp. 44-555c(k).

Dated this ____ day of July, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James A. Cline, Attorney for Claimant
John R. Emerson, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge